Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1454

In the

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT J. WILL, et al.,

Petitioners,

vs.

COMPREHENSIVE ACCOUNTING CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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131 pp

QUESTIONS PRESENTED

1. Whether Comprehensive could be found to have committed a *per se* violation of the antitrust laws in a case involving an alleged tying arrangement absent proof that it had market power in the alleged tying product.

2. Whether one of the district court's jury instructions was in conflict with this Court's decision in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Seventh Circuit in this case in *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985).

STATEMENT OF THE CASE

This case arose out of a dispute between Comprehensive Accounting Corporation ("Comprehensive") and several of its franchisees over their ability to have their required

data processing done on minicomputers rather than on Comprehensive's mainframe. Petitioners claimed that they had complied with the requirements of their agreements with Comprehensive that permitted them to have their data processing done on minicomputers if certain standards were met, whereas Comprehensive claimed that they had failed to do so. Certain franchisees who were terminated and others who continued to use Comprehensive's mainframe commenced this action claiming that Comprehensive's refusal to permit them to have their data processing done on minicomputers constituted an illegal tying arrangement.

After a lengthy trial that involved antitrust as well as contract and other issues on which there were substantial factual disputes, the jury returned a verdict in favor of respondents on the antitrust claims. On petitioners' appeal, the Seventh Circuit concluded that, not only was the jury properly instructed, but, because petitioners failed to show that Comprehensive had market power in the alleged tying product—its franchise system, they failed to establish a *per se* antitrust violation as a matter of law.

SUMMARY OF ARGUMENT

The writ should be denied because, petitioners' argument notwithstanding, there is no real conflict between the Seventh Circuit's decision in this case and any decision of this Court or of another federal court of appeals. The issues raised by the petition involve application of settled principles, rather than conflicts of principles, and review of the Seventh Circuit's decision will impact primarily on only the parties to this case.

REASONS FOR DENYING THE WRIT

I.

Although petitioners initially state that the holding of the court below "directly conflicts" with this Court's decision in *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984) (Pet. 5), later in their petition, they claim that it merely "subverts" it (Pet. 6). Regardless of which position they truly espouse, petitioners do not suggest *how* Judge Easterbrook's decision for the Seventh Circuit purports to conflict with this Court's decision in *Hyde*.

In fact, the Seventh Circuit's decision is entirely consonant with *Hyde*, wherein this Court held that a *per se* illegal tying arrangement can be established only when either the seller has market power in the tying product or the tying product is unique. The Seventh Circuit held that, although Compresensive's franchising system—the alleged tying product—may be unusual, it is not unique, and, therefore, petitioners must have presented proof of market power, which they did not do. *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d at 674. Although petitioners may disagree with this conclusion, it does not subvert, and is certainly not in conflict with, this Court's decision in *Hyde*, which did not consider the question of "uniqueness". That question was considered by this Court in *United States Steel Corp.* v. *Fortner Enterprises*, 429 U.S. 610 (1977) (*Fortner II*), however, and the conclusion of the court below that Comprehensive's franchise system is not unique is consistent with that decision.

Nor does the decision of the court below conflict with the decisions of the Courts of Appeal for the Fifth and Ninth Circuits in *Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976), and *Digidyne Corp.* v. *Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 3534 (1985). Neither *Carpa* nor *Digidyne* holds, as petitioners claim, "that an illegal tie could be established based on the uniqueness of the tying product without showing market power over price" (Pet. 6). Indeed, after conceding the uniqueness of the tying product, the court of appeals in *Carpa* held directly to the contrary:

> We adhere to the principle applied by the Supreme Court in *Fortner, supra*:
>
> > [T]he proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market. 394 U.S. at 504, 89 S.Ct. at 1259.

536 F.2d at 48. Moreover, to the extent that it could be said that either decision stands for the proposition that petitioners suggest, it, not the decision of court below, is in conflict with prior decisions of this Court. *See Copperweld Corp.* v. *Independence Tube Corp.*, 104 S.Ct. 2731, 2752 n. 19 (1984) ("Market power is the ability to raise prices above those that would be charged in a competitive market".).

Both *Carpa* and *Digidyne* are also distinguishable from the decision of the court below. In *Carpa*, the court conceded the uniqueness of the tying product, and, in *Digidyne*, the tying product was unique because it enjoyed copyright protection. Judge Easterbrook concluded in this case, however, that Comprehensive's franchise system—the alleged tying product—is not unique, and, thus, in or-

der to have prevailed, petitioners must have shown that Comprehensive had market power over price. This does not conflict with either *Carpa* or *Digidyne* and is entirely consistent with *Hyde*.

II.

Petitioners further argue that the holding of the court below conflicts with the decision of the Ninth Circuit Court of Appeals in *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). The court there held "that the District Court did not err in ruling as a matter of law that the tying product—the license to use the Chicken Delight trade-mark—possessed sufficient market power to bring the case within the Sherman Act." 448 F.2d at 50. This is a far cry from saying, as petitioners do, that a defendant need not possess market power to be guilty of an illegal tie-in. The Seventh Circuit's conclusion in this case that Comprehensive did not have market power as a matter of law does not conflict with the Ninth Circuit's conclusion in *Siegel* that Chicken Delight did. The decisions of these two courts of appeals are reconcilable on their facts. There is no "real and embarrassing conflict" between them. *Layne & Bowler Corp.* v. *Western Wheel Works, Inc.*, 261 U.S. 387, 393 (1923).

Even if these decisions were construed to be in conflict, Judge Easterbrook's decision for the Seventh Circuit in this case is in accordance with the majority view that the existence of a trademark in and of itself does not supply economic power sufficient to constitute an antitrust violation. *See Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d at 48; *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d 658, 663 (2d Cir. 1974). *Siegel*, on the other hand, has been questioned even within the Ninth Circuit itself, *See Krehl*

v. *Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D.Cal. 1978), and is of questionable continuing vitality in light of this Court's decision in *Hyde* and in light of the proliferation of franchise systems in the fast-food business, as well as other businesses of all kinds. *Jack Walters & Sons Corp.* v. *Morton Building, Inc.*, 737 F.2d 698, 705 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 785 (1985).

III.

Lastly, petitioners suggest that the holding of the court below directly conflicts with this Court's decision in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). Petitioners contend that one of the numerous jury instructions that the district court gave in this factually complex case was inconsistent with this Court's holding in *Perma Life*. This Court did not purport to fashion jury instructions in *Perma Life*; it only established the law on which the jury was to be instructed. Even if the instruction that was given may not have been a model of clarity, both the district court and the court of appeals held that it was proper, and it certainly cannot be said to conflict with this Court's decision in *Perma Life*, when the jury was instructed that a conscious commitment to a common scheme meant "that the franchisee unwillingly agreed to use Comprehensive for its data processing, an agreement induced by a fear of termination." (Pet. 9).

Even assuming *arguendo* that the instruction complained of was somehow objectionable, because petitioners did not establish market power as they must have done, granting certiorari to review this question will neither change the outcome of this case nor affect the outcome of future decisions. In any event, this question (and any other raised by petitioners) does not warrant this Court's review be-

cause it does not involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Wheel Works, Inc.*, 261 U.S. at 393.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not be granted.

Respectfully submitted,

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